No. 10964

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
*Appellant,*

- VS. -

UNITED STATES OF AMERICA,
*Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

## BRIEF OF APPELLEE

J. CHARLES DENNIS
*United States Attorney*

HARRY SAGER
*Assistant United States Attorney*
*Attorneys for Appellee.*

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON
324 POST OFFICE BUILDING



BALLARD NEWS, SEATTLE, WASHINGTON -- 5/28/45 -- 45 COPIES

No. 10964

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
*Appellant,*

- VS. -

UNITED STATES OF AMERICA,
*Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

## BRIEF OF APPELLEE

J. CHARLES DENNIS
*United States Attorney*

HARRY SAGER
*Assistant United States Attorney*
*Attorneys for Appellee.*

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON
324 POST OFFICE BUILDING

BALLARD NEWS, SEATTLE, WASHINGTON -- 5/28/45 -- 45 COPIES

## INDEX


page

STATEMENT OF THE CASE ..... 1

QUESTIONS INVOLVED ..... 7

ARGUMENT ..... 7

THE TELEGRAM WAS SUFFICIENTLY IDENTIFIED IN THE FIRST INSTANCE . 10

THE TELEGRAM WAS ADMISSABLE AS AN OFFICIAL DOCUMENT ..... 14

THE DEFENDANTS OFFER OF PROOF AS TO ADVICE OF COUNSEL WAS PROPERLY REFUSED ..... 20


## STATUTES CITED


Title 50, United States Code, Sec. 311 App. ..... 1

Title 28, United States Code, Sec. 661, 1944 Pocket Part. ..... 14


## CASES CITED


*Block v. United States*, 7 Court of Claims, 406 .. 18

*Cohn v. United States*, 258 Fed. 355 ..... 18

*DREXAL v. True*, 74 Fed. 12 ..... 10

*Ford v. United States*, 10 F. (2d) 339 ..... 10

*Hartzell v. United States*, 72 F. (2d) 569 ..... 11

*Lewis v. United States*, 38 F. (2d) 406 ..... 13

*Hopper v. United States*, 142 F. (2d) 181 ..... 16

*Howenstine v. United States*, 263 Fed. 1. ..... 17

No. 10964

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
*Appellant,*

- vs. -

UNITED STATES OF AMERICA,
*Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

## BRIEF OF APPELLEE

## STATEMENT OF THE CASE

The defendant was indicted and convicted for violation of the Selective Training and Service Act of 1940 (T. 50, U.S.C.A. App. Sec. 311), for having knowingly refused to present himself for induction when directed so to do by his draft board. (Tr. p. 2).

Appellant states in his brief, at p. 2 under "Statement of the Case" as follows:

> "Appellant did not deny receipt of the notice to report and did not deny that he had failed to report on May 13, 1944, the date fixed in the notice. His defense was based upon the contention that he thought in good faith that the order of induction had been stayed pending a further examination of his status, and that his failure to report on the day specified and thereafter, was therefore not willful."

Since the principal issue made by the defendant during the trial of this cause was the question of whether or not his failure to report for induction was willful we think it advisable to briefly review the evidence concerning his relations with his draft board as we believe it will throw considerable light on his "intent" in failing to comply with the order of induction.

Mr. Lindstrom was required to, and did register with the first registration under the Selective Service Act in October, 1940. In due course he filed his Selective Service questionnaire and was classified 1-A on March 7, 1941. At that time he was not married (Tr. p. 54). The classification made him subject to immediate induction. Upon his receiving his notice of his classification he called upon the Board members seeking deferment. He then appealed his classification on April 18, 1941 (Tr. p. 27). His classification was affirmed by the Appeal Board and on June

17, 1941, he was ordered up for induction (Tr. p. 28). In the meantime the defendant had been in to see his local board and the date of his induction was postponed by the Board on two occasions for thirty days each. At the end of the period of postponement he was reclassified 1-H by reason of a change in the policy of Selective Service which had occurred in the interim and which gave that classification to men over the age of 28, and constituted a deferment (Tr. p. 28). From that time down to January 22, 1944, the defendant was given several different classifications, he having married on March 27, 1941, and having become employed in the Seattle-Tacoma ship yards, by virtue of which he was given certain occupational classifications and deferments (Tr. p. 29).

On January 22, 1944, the defendant was again classified 1-A because his deferment was no longer requested by the said Seattle-Tacoma ship yards, and he was directed to report for a pre-induction physical examination on February 10, 1944 (Plaintiff's Exhibit 8, Tr. p. 31). He did not report for this pre-induction physical examination (Tr. p. 33). In the meantime, on February 7, 1944, he again appeared before the Board asking for a change in his classification and requesting a further appeal. He was again ordered to report for pre-induction physical examina-

tion on March 7, 1944 (Tr. p. 34). He failed to appear for this physical examination but instead called the draft board by telephone advising them that he would be unable to report (Tr. p. 37). However, on the same day he sent a telegram to President Roosevelt stating that he would not appear for pre-induction physical (Tr. p. 77. Plaintiff's Exhibit 18). He then appealed from the 1-A classification and this classification was affirmed by the Appeal Board (Tr. p. 37-38). He was then ordered to report for induction on May 13, 1944 (Tr. p. 39, Plaintiff's Exhibit 13). His failure to comply with this order was the basis of the charge for which he was tried and convicted.

On April 27, 1944, the day after he was mailed the notice to report for induction the defendant appeared at the draft board office. He there tore up the notice of classification resulting from the Appeal Board's affirmance and threw it at the Clerk. He then stated that he would not report, that he did not consider he was properly classified and that he would not abide the rules until the classification he desired was forthcoming (Tr. p. 43-44).

For the next several weeks the defendant pursued a course of conduct in which either he or his wife, acting for him, called upon almost every agency of Selective Service, the United States Attorney's office

and the deferment department of his employer. In all of these contacts he was still defiantly insisting upon a reclassification which would defer him from service.

On May 10th the defendant's wife called Commander Chastek, who was State Occupational Advisor of the Selective Service. She was seeking the Commander's assistance in obtaining deferment for her husband. On July 31, 1944, the defendant telephoned Commander Chastek attempting to secure a deferment (Tr. p. 79). In the latter part of May the defendant and his wife called upon Major Armstead, who was Assistant Occupational Advisor to Selective Service. He complained to the Major that he was not properly classified (Tr. p. 81). Major Armstead warned him that if he had an order from the Board he had better obey it or he would find himself in jail, and the defendant replied that he wouldn't do it, that his classification was not right and that he was not going to report (Tr. p. 81, 82). In the latter part of July he and his wife called at the United States Attorney's office (Tr. p. 57). In July he called upon his Local Board stating that he expected a reclassification, if warranted (Tr. p. 58). After receiving his order to report for induction he applied for a deferment at the ship yards (Tr. p. 58).

On no less than six separate occasions the defendant was directly warned, either in writing or verbally that his failure to comply with the orders of the draft board subjected him to prosecution:

(1). The first order to report for pre-induction physical examination warned him that he would be subject to fine and imprisonment if he failed to report (Tr. p. 33).

(2). The second order to report for pre-induction physical examination contained the same warning (Tr. p. 36).

(3). The order to report for induction contained a warning that "willful failure to report promptly" is a violation and subjects registrant to fine and imprisonment (Tr. p. 40).

(4). The letter directed to him from the Federal Bureau of Investigation contained a warning that failure to obey instructions of his draft board might subject him to prosecution (Tr. p. 51 and 57.)

(5). When he called at the United States Attorney's office, the Assistant United States Attorney there admonished him that he would either have to get the matter straightened out with his draft board or there would be a prosecution. (Tr. p. 56).

(6). Major Armstead, upon whom defendant called seeking deferment, warned him "if you have got an order from the Board you better obey it or you will find yourself in jail" (Tr. p. 81).

Despite these series of warnings the defendant persisted in his refusal to obey the orders of the draft board, even unto the day of trial. His entire attitude toward his draft board and his obligation under Selective Service was succinctly stated in his own telegram to the President (Tr. p. 77).

## QUESTIONS INVOLVED

There are two issues presented by this appeal:

(1). Was prejudicial error committed by admission of the telegram to the President.

(2). Was prejudicial error committed by refusing the defendant's offer of proof with respect to certain advice from his counsel.

## ARGUMENT

We will consider the issues here in the order in which they are stated in the questions above. That is the same order in which they are presented in the appellant's brief.

The question as to the admission in evidence of the telegram is presented by appellant's Specification of Error No. 2. If we understand appellant's argument, he contends that the telegram was not admissible because no proper foundation was laid connecting it with the defendant, or it was not sufficiently identified. The telegram (Plaintiff's exhibit 18) was offered by the Government at two points during the course of the trial. It was offered during the cross examination of the defendant. The testimony of the defendant concerning this telegram is brief enough that we feel justified in setting it forth here in full. It is as follows (Tr. p. 58):

> "I was ordered to report for physical examination on March 7th, 1944. That is the time I called up the draft board and said I couldn't appear on that day because of my wife's condition. I sent a telegram to the President in connection with this matter."
>
> Q. I will show you Plaintiff's Exhibit 18 and ask you if that is the telegram you sent to President?
>
> A. I suppose. That is not the way I worded it.
>
> The Court: Speak up a little louder.
>
> A. That is something like it, I can't remember putting in this statement.
>
> Q. Well, you do recall sending a wire or telegram to the President on March 7th, 1944?

A. I recall sending a telegram.

Mr. Sager: We offer that in evidence."

At this point admission of the telegram was rejected by the Court on the basis that there was not sufficient identification. Later it was again offered by the Government during the course of redirect examination of the witness Jean Schonborn, who was the clerk of the draft board. She identified the telegram as an original document from the draft board's official files (Tr. p. 75). At this point it was admitted in evidence and read to the jury.

The appellant states in his brief, at page 8, that there was no evidence to show that the telegram was ever received by the President. However, the telegram on its face bears the receiving stamp of the White House (Tr. p. 77).

---

[1]The copy of the telegram set forth in the Transcript of Record shows the White House receiving stamp. It is our recollection of the exhibit that it also shows the receiving stamps of the National Headquarters of Selective Service, of Washington State Headquarters of Selective Service, and of the local draft board. If our recollection of the exhibit is correct an examination of it will indicate the course of its transmission from the White House back to the registrant's local board. We respectfully suggest the court's examination of the original exhibit.

It is the Government's contention that the telegram was properly admitted for two separate reasons:

(1). It was sufficiently identified to make it admissible when first offered;

(2). When later offered and admitted it was admissible because it was a part of the official records of an Executive department.

## THE TELEGRAM WAS SUFFICIENTLY IDENTIFIED IN THE FIRST INSTANCE

In discussing the first proposition we should like to direct attention to the authorities cited by the appellant. The appellant relies largely upon *Drexal v. True*, 74 Fed. 12. It should be pointed out that in that case there was no evidence that the telegram had been received by the addressee which would seem to distinguish it from the instant case in which the telegram itself shows its receipt at the White House.

The appellant also quotes from *Ford vs. United States*, 10 F. (2d) 339. An examination of that case will show that the telegrams involved there were admitted and that this court approved their admission, holding that the proof connecting the telegram with

the sender may consist of circumstantial evidence and then detailing the evidence of the circumstances in that case, which are not unlike the evidence in the instant case.

Appellant also quotes from the case of *Hartzell v. United States*, 72 F. (2d) 569. We wish to point out that in this case, as in the Ford case, *supra*, the cablegrams were actually admitted in evidence and their admission approved by the appellate court.

In the *Hartzell* case the defendant was charged with violation of the mail fraud statute. The evidence in that case discloses that Hartzell, while a resident of London, England, devised a scheme to obtain contributions from persons in the United States to a so-called expense fund for the prosecution of his alleged claim to the vast estate of the buccaneer, Sir Francis Drake. In carrying out this scheme he had many agents in the United States soliciting contributions. The cablegrams which were admitted in evidence were sent by Hartzell from London to certain of these agents in the United States. The cablegrams admitted were the ones received in this country and there was nothing to establish their connection with the defendant, Hartzell, except evidence that they were received, and the fact that the cablegrams themselves indicated they came from London and bore the type-

written name "Hartzell". They were received by persons shown to have been dealing with Hartzell and their contents related to the business between Hartzell and these agents. The same objection was urged to the admission of these cablegrams as is urged in the instant case, viz., that there was no sufficient foundation for their introduction. It is respectfully suggested that the facts regarding the telegram in the instant case are strikingly like those in the Hartzell case. The defendant admitted sending a telegram to the President at about this time "in connection with this matter" (the matter of his reporting for physical examination) (Tr. p. 59). The telegram bore the name of the defendant and his address (Tr. pp. 58 and 51). The defendant, in effect, admitted the sending of the telegram when asked if it was the one he sent to the President, and he answered "I suppose". He qualified this answer by the statement that he couldn't remember certain statements in it (Tr. p. 59). The contents of the telegram all have to do with his alleged difficulties with his draft board. In considering these facts we respectfully direct the Court's attention to the following language of the Court in the Hartzell case which appears at p. 578:

> "But as to these and the other cablegrams there is undisputed evidence in the record sufficient to establish their authenticity and defendant's

> connection therewith. (a) Large sums of money were forwarded to defendant in London by the agents whom he selected to carry on his work in this country. The cablegrams fit into as related parts of a whole scheme with other circumstantial evidence, the competency of which is not challenged, establishing the connection between defendant and these parties to whom the telegrams were sent. (b) Their subject-matter, considered with this other evidence, competent and undisputed, unquestionably proves plaintiff to be their author. The connection of a defendant in a criminal case with the writing or mailing of a writing may be established by circumstantial as well as direct evidence. (citing cases.)"

This court has applied much the same rule and reasoning in the case of *Lewis v. United States*, 38 F. (2d) 406. This is also a mail fraud case. A letter was admitted in evidence in this case upon evidence that it was received by the witness through the mail and bore the letterhead of the corporation operated by the defendant. It had a signature purporting to be the signature of the defendant, although there was no identification of this signature by the witness, or otherwise. It was urged in this court that there was no foundation laid for its admission. This court approved its admission and said, concerning it, at page 416:

> "The question of whether or not the authenticity of a letter has been sufficiently proved prima facie to justify its admission in evidence rests

in the sound discretion of the trial judge. (citing cases). The contents of this letter is most persuasive of its authorship. There were scores of letters and documents then and thereafter introduced in evidence bearing the original or facsimile signature of S. C. Lewis. The original letter has been sent here with the record, and the signature to the letter is evidently that of the appellant Lewis."

## THE TELEGRAM WAS ADMISSIBLE AS AN OFFICIAL DOCUMENT

In addressing ourselves to this proposition as an additional basis for the admission of the telegram, we reply upon Section 661, Title 28, United States Code, (1944 Pocket Part) from which we quote as follows:

> "Sec. 661. Copies of department or corporation records and papers; admissibility; seal
>
> (a) Copies of any books, records, papers, or other documents in any of the executive departments, or of any corporation all of the stock of which is beneficially owned by the United States, either directly or indirectly, shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department or corporation, respectively."

The appellant, in his brief, (p. 14) attempts to anticipate this section as authority for the admission of the telegram. However, it seems to us that he has misconstrued the cited section and argues that even under this section it was not admissible because not an *authenticated* copy. It is apparent that this section

authorized the admission in evidence of *original* records, as well as *authenticated* copies thereof.

Plaintiff's exhibit 18, the telegram, is not a copy of the draft board's record, but is the original instrument itself and hence under this statute there is no necessity for its authentication or certification. All that is required is that it be identified as an original portion of the official files or records of the draft board.

The clerk of the draft board was not authenticating a portion of the President's files, but was identifying a document from her own official records.

This telegram became an official part of the draft board's records when the telegram was received by the draft board from the State Headquarters. It was thereafter required by regulation to keep the telegram as a part of its records. See Selective Service Regulations 605.21(b), as follows:

> "605.21(b) Records to be maintained. Each selective service agency shall retain all correspondence received and a copy of all correspondence sent in its files until authorization for its disposition is received from the Director of Selective Service."

And Section 615.43, as follows:

> "615.43. Preparation of Cover Sheets and Filing Folders. After each registrant in Group 1,

> Group 2, Group 3, Group 5, or Group 6, is listed in the Classification Record (Form 100), the local board shall open an individual file for him by preparing a cover sheet (Form 53). These cover sheets (Form 53) shall be maintained in a file in the local board. *Every paper pertaining to the registrant, except his Registration Card (Form 1) shall be filed in his Cover Sheet (Form 53).*" (Italics supplied).

Appellant argues, and cites some cases to the effect, that even under this section of the Code, documents which become lodged incidentally in an executive department, do not thereby become an official record. However, by virtue of the Selective Service Regulations quoted above, this telegram was by said regulations required to be kept by the Board as a part of its records.

Draft board files have been held by the courts to be official records entitled to admission in evidence as such under this section. This court has held them admissible in at least two cases.

In *Hopper v. United States*, 142 F. (2d) 181, a recent decision of this court and a Selective Service case, the Court said, concerning the admission of draft board records, at page 186:

> "Appellant assigns as error numerous rulings on the admission of evidence. His objections were to exhibits comprising his signed questionnaire, his conscientious objector report, and other docu-

> ments relating to his registration and sufficiently identified as official records of the Selective Service Board. There was no error in admitting these exhibits."

This court also approved the admission of a portion of a draft board record as an official record in the case of *Howenstine v. United States*, 263 Fed 1. This case involved a prosecution under the espionage act during or just following the First World War and was based upon the charge that the defendants conspired, etc., to cause insubordination, disloyalty and refusal of duty in the armed forces by soliciting draftees to be fitted with eye glasses that would impair their vision and thus cause them to be rejected from service in the armed forces. There was admitted in evidence a part of the records of one of the defendant's draft board, a report of his physical examination at Hollywood and Camp Lewis. A member of the draft board identified the exhibit as the regular form used and stated that it was returned by mail from Camp Lewis to the local board. This court, upholding its admission, said, at page 7:

> "The court admitted the document on the ground that it was a public record. It was undisputed that LeRoy when examined by the local board was accepted and when examined at Camp Lewis was rejected. The record was public and official, and we think it was not reversible error to admit it for the purpose specified in the ruling of the

> court. Prima facie it showed the ground on which LeRoy was rejected. It did not preclude the defendants from showing that the cause was otherwise than as there stated, or that LeRoy's eyesight was not in fact defective. That there was in fact any other cause of his final rejection was not suggested by the defense."

In the case of *Cohn v. United States*, 258 Fed. 355 the Second Circuit Court considers the admissibility of authenticated letters from the official files of the Navy Department. These letters consisted of correspondence between one Meade, a Navy yeoman, and the defendant. They were obtained from the defendant's files by a navy inspector. This correspondence was put in evidence in a court martial proceeding against Meade and thereafter transferred to the office of the Judge Advocate General of the Navy. At the trial of Cohn no effort was made to get the original correspondence from the Navy Department, or even authenticated copies thereof, but there was offered in lieu thereof secondary copies made by the navy inspector. In considering the admissibility of such letters if they had been authenticated, the court considers the case of *Block v. United States*, 7 Court of Claims, 406, which latter case had placed a somewhat restricted interpretation upon the admissibility of official records. The court, in the *Cohn* case re-

fuses to follow the restricted interpretation and stated as follows, at page 362:

> "We are not inclined to put so narrow a construction upon the statute, and we can see no substantial reason for thinking that copies of such letters as are on file in the record of the proceedings of the court-martial, and which are authenticated by the Department of the Navy as provided in the act, may not be introduced in evidence at the trial of the defendant. The statute authorizes the introduction in evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is required to be so filed and kept on file is in the opinion of the majority of the court an official document as much so as one which is written or published by an officer in his official character or in the performance of an official duty. The word 'official' is defined in the New Standard Dictionary as follows:
>
> '1. Of or pertaining to an office or public trust; as official duties.
>
> 2. Derived from the proper office or officer, or from the proper authority; authoritative; as, an official report.'
>
> "A paper which must be kept on file in a designated office and which cannot be removed therefrom, pertains to that office, and so becomes of-

ficial. And we are unable to see why the statute is not as applicable to that class of official papers as well as to the other class. The one class is as much within the letter of the statute as is the other, and it is also as much within the reason and the spirit of the statute.

"The introduction in evidence of copies of letters on file in the Department of the Navy at Washington, and which are required by law to be kept there, and which were not authenticated under the seal of the department, was error. Copies so authenticated would have been as admissible as the originals; copies not so authenticated were not admissible as the originals."

## THE DEFENDANTS OFFER OF PROOF AS TO ADVICE OF COUNSEL WAS PROPERLY REFUSED.

This issue is raised by appellant's Assignment of Error No. 1. It is treated more or less casually in his brief, without citation of any authorities.

It appears that this assignment is predicated upon the court's refusal to permit the defendant to testify as to certain advice he was supposed to have received from his then counsel at a time subsequent to the date on which he was required to report for induction.

It is not clear to us, at least, just what the advice of his counsel was supposed to have been.

He states in his brief at page 20,

> "Appellant sought to testify that he was informed by his attorney that the matter was in the hands of the United States Attorney, and that he, the attorney, would let him know when anything further developed."

It is difficult for us to conceive how this purported advice could in any way justify the defendant's failure to report for induction, and particularly so in view of the fact that his failure to comply with the Board's order had occurred on May 13th (Tr. p. 39) and the advice of his attorney was not given until some time after August 11, the date of the letter to his attorney from the F. B. I. (Tr. p. 67).

In this connection the following provisions of the Selective Service regulations, Sec. 633.21(a), would seem to be pertinent.

> "Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains."

Under these regulations the defendant was under a continuous duty from and after May 13, 1944, from day to day to report to his board for induction. His failure to do so constituted a continuing violation. Any advice that his attorney may have given him three

months later could not justify his continued failure to comply with the law, nor could it have any bearing upon his "intent" in so failing to comply.

The judgment of conviction should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
*United States Attorney*

HARRY SAGER
*Assistant United States Attorney*